DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Determination of Nonessential Experimental Population Status for an Introduced Population of the Yellowfin Madtom in Virginia and Tennessee

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service will reintroduce a small catfish, the yellowfin madtom (*Noturus flavipinnis*) (Federally listed as a threatened species), into the North Fork Holston River, Washington County, Virginia. This population is determined to be a nonessential experimental population according to section 10(j) of the Endangered Species Act of 1973, as amended. Section 10(j) of the Act authorizes nonessential populations to be treated as if they were proposed species for the purposes of section 7. This releases Federal agencies from the Act's prohibition against jeopardizing this population by their actions. The yellowfin madtom once likely inhabited many of the lower gradient streams of the Tennessee River basin upstream of Chattanooga, Tennessee. Presently, populations are confined to only three stream reaches in the Tennessee River valley. This action is being taken in an effort to reestablish the yellowfin madtom within its historic range.

EFFECTIVE DATE: September 6, 1988.

ADDRESSES: Comments and materials relating to this final rule are available for public inspection by appointment during normal business hours at the U.S. Fish and Wildlife Service, 100 Otis Street, Room 224, Asheville, North Carolina 28801 (704/259-0321 or FTS 672-0321).

FOR FURTHER INFORMATION CONTACT: Mr. Richard G. Biggins at the above address.

SUPPLEMENTARY INFORMATION:

Background

Among the significant changes made by the Endangered Species Act Amendments of 1982, Pub. L. 97-304, was the creation of a provision (section 10(j)) which provides for the designation of specific reintroduced populations of listed species as nonessential experimental populations. Under previous authorities in the Act, the Service was permitted to reintroduce populations into unoccupied portions of a listed species' historic range when it would foster the conservation and recovery of the species. Local opposition to reintroduction efforts, however, stemming from concerns about the restrictions and prohibitions on private and Federal activities contained in sections 7 and 9 of the Act, severely handicapped the effectiveness of this as a management tool.

Under section 10(j) of the 1982 Amendments, past and future reintroduced populations established outside the current range but within the species' historic range, may be designated, at the discretion of the Service, as experimental populations or nonessential experimental populations. Experimental population status allows the Service to treat an endangered species as threatened for the purposes of section 9 of the Act. Species listed as threatened can be managed with greater flexibility, especially regarding incidental take and regulated taking. As the yellowfin madtom is already listed as a threatened species with special rules (50 CFR 17.43), which provide that the fish may be taken in accordance with applicable State law, the species' status relative to section 9 will remain the same for any introduced populations.

Nonessential populations are experimental populations found to be nonessential to the continued existence of the species. These populations are treated as if the species were only proposed for listing under section 7 (except for subsection (a)(1)). Therefore, they are not subject to the provisions of section 7(a)(2) of the Act, which requires Federal agencies to ensure that their activities are not likely to jeopardize the continued existence of a listed species. However, two provisions of section 7 would apply on lands that are not within the National Wildlife Refuge System or National Park System: Section 7(a)(1), which authorizes all Federal agencies to establish conservation programs, and section 7(a)(4), which requires Federal agencies to confer informally with the Service on actions that are likely to jeopardize the continued existence of the species. Where the species occurs on Refuge or Park System lands, all provisions of section 7 would apply. The organisms used to establish an experimental population will only be removed from an existing source if (1) the removal will not jeopardize the continued existence of the species and (2) a permit has been issued for the take of individuals from the donor population in accordance with the requirements of 50 CFR 17.31.

The yellowfin madtom was listed as a threatened species with critical habitat on September 9, 1977 (42 FR 45528). The species was probably once widely distributed in many lower gradient streams of the Tennessee River drainage upstream of the Chattanooga, Tennessee, area (Jenkins 1975). The species' present distribution (Burkhead and Jenkins 1982, Shute 1984) is represented by only three known populations (Citico Creek, Monroe County, Tennessee; Powell River, Hancock County, Tennessee; and Copper Creek, Scott and Russell Counties, Virginia). Three other historic populations (Chickamauga Creek, Catoosa County, Georgia; Hines Creek, Anderson County, Tennessee; and North Fork Holston River, Virginia) are believed to have been extirpated primarily due to human-related factors (impoundments, pollution, habitat modification, etc.).

The yellowfin madtom occupies small-to-medium-sized (25 to 135 feet wide) warm water streams with moderate current and clean water with little siltation (Jenkins 1975). The species is generally associated with cover (undersides of flat rocks, detritus, and stream banks) (Jenkins 1975, Shute 1984).

Good habitat for the yellowfin madtom is currently located in the North Fork Holston River, Smyth, Washington, and Scott Counties, Virginia. The establishment of an experimental population in this now unoccupied historic habitat will greatly enhance the recovery potential of this species. During the late summer or early fall of 1988 or 1989, 100 to 200 captive-reared madtoms (taken in the spring and

summer of 1988 or 1989 from nests on Citico Creek, Monroe County, Tennessee) will be reintroduced into one or two pools on the North Fork Holston River, Washington County, Virginia. The techniques for rearing and transplanting the species were developed in 1986 and 1987 when a reintroduction was made into Abrams Creek, Blount County, Tennessee. The success of this introduction attempt is being evaluated.

Based on studies conducted on the Citico Creek population (Shute 1984; David Etnier, Peggy Shute, and Randy Shute, University of Tennessee, personal communication, 1986), it is believed that approximately 125 yellowfin madtom nests exist in Citico Creek each year. The yellowfin madtom nests each contain about 90 eggs. Three to four nests would be taken, and, allowing for natural mortality, these would yield the desired 100 to 200 individuals for stocking. The removal of three to four nests represents only about 3 percent of each year's total clutches. This amount of loss is well within the limits of natural loss that would likely occur on an average reproductive year (D. Etnier, P. Shute, and R. Shute, personal communication, 1986). Therefore, the Service has determined that the removal of the animals from Citico Creek to be used in the North Fork Holston River transplant is not likely to jeopardize the continued existence or viability of the Citico Creek population. Furthermore, the creation of this experimental population, as proposed, will further the conservation of the species throughout its range.

Status of Reintroduced Population

This reintroduced population of yellowfin madtoms is being designated as a nonessential experimental population according to the provisions of section 10(j) of the Act. The nonessential experimental population status, which is necessary to gain the acceptance of the Virginia Commission of Game and Inland Fisheries for the reintroduction effort, is appropriate for the following reasons: Reproducing populations of the yellowfin madtom presently exist in three river reaches. The removal of individuals from the extant population in Citico Creek, Monroe County, Tennessee, is not expected to adversely affect the viability of that population (see Background section above). Therefore, the loss of the introduced population would not reduce the likelihood of the survival of the species in the wild. In fact, the anticipated success of this reintroduction will enhance the species' recovery potential by extending its current range and reoccupying currently unutilized historic habitat.

Summary of Comments and Recommendations

In the September 8, 1987, proposed rule (52 FR 33850) and associated notifications, all interested parties were requested to submit factual reports and information that might contribute to the development of a final rule. Appropriate State and Federal agencies, county governments, scientific organizations, and interested parties were contacted and requested to comment. Six written comments were received and are summarized below.

Support for the proposal was received from the Tennessee Department of Conservation, U.S. Forest Service, and the Virginia Cooperative Fishery Research Unit. The State of Virginia Department of Game and Inland Fisheries and the Tennessee Valley Authority provided no specific comments, but did request that the Service inform them of the exact location of the transplant site. The Service will coordinate the release of the fish with these agencies, and specific site data will be provided prior to the release.

The Smyth County Board of Supervisors objected to the proposal to establish a nonessential experimental population of the yellowfin madtom in the North Fork Holston River. However, they provided no reason for their objection.

A Service biologist met with the Board and explained the proposed rule specifically emphasizing the greatly reduced protection the Act provides to nonessential experimental populations. The Board voted again to oppose the reintroduction.

The proposed rule stated that the yellowfin madtom would be introduced into the North Fork Holston River in Smyth County, Virginia. Discussion with ichthyologists knowledgeable with the species indicates that suitable sites for introduction are available downstream in Washington and Scott Counties, Virginia (Charles Sayler, Tennessee Valley Authority; David Etnier, University of Tennessee; and Robert Jenkins, personal communications, 1987). The Service has discussed the use of Washington County as a reintroduction site with the Washington County Administrator, and he had no objection to reintroducing the fish into his county. Therefore, because of Smyth County's objection and the availability of suitable sites in Washington County, Virginia, the final rule has been modified to show that the reintroduction will be made into North Fork Holston River in Washington County, Virginia, rather than Smyth County, Virginia. If the reintroduction is successful and the species expands its range downstream and upstream in the North Fork Holston River, the species could be considered for delisting before any of these fish ever reach Smyth County, Virginia.

Location of Reintroduced Population

The area for reintroduction of the yellowfin madtom is totally isolated from existing populations of the species. The madtom will be released into the North Fork Holston River, Washington County, Virginia. This site is separated from other existing populations by both Tennessee River and tributary reservoirs, and the fish is not known from any of these reservoirs or intervening river sections. These reservoirs and river sections act as barriers to movement by the fish and assure that the Holston River population will remain geographically isolated and easily identifiable as a distinct population.

Management

This translocation project will be a joint cooperative effort among the Virginia Commission of Game and Inland Fisheries, the Tennessee Wildlife Resources Agency, and the U.S. Fish and Wildlife Service. Present plans call for the release of 100 to 200 young-of-the-year animals in the late summer or early fall of 1988. Subsequent releases will be made contingent on funds in 1989 and later years. Released animals will be monitored to determine survival, reproductive success, and general health.

This nonessential experimental population would be treated as a threatened species under all provisions of the Act, except section 7. Under section 7 (other than subsection (a)(1) thereof) a nonessential experimental population shall be treated, except when it occurs in an area of the National Wildlife Refuge or National Park Systems, as a species proposed to be listed under the Act as a threatened species. All of the prohibitions referred to in 50 CFR 17.31 would apply to this population. In addition, members of this experimental population could be taken in accordance with applicable State laws. Thus, if a fisherman accidentally took a member of this experimental population based upon a misidentification of the species, there would be no violation of Federal law.

National Environmental Policy Act

An environmental assessment under the National Environmental Policy Act

has been prepared and is available to the public at the Service's Asheville Field Office (see "ADDRESSES" section), Atlanta Regional Office (U.S. Fish and Wildlife Service, Richard B. Russell Federal Building, 75 Spring Street SW., Atlanta, Georgia 30303), or the Division of Endangered Species and Habitat Conservation, U.S. Fish and Wildlife Service, 1000 N. Glebe Road, Arlington, Virginia 22201 (202/235–1975). This assessment formed the basis for the decision that this is not a major Federal action which would significantly affect the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969 (implemented at 40 CFR Parts 1500–1508).

Executive Order 12291, Paperwork Reduction Act, and Regulatory Flexibility Act

The U.S. Fish and Wildlife Service has determined that this is not a major rule as defined by Executive Order 12291 and that the rule would not have a significant economic effect on a substantial number of small entities as described in the Regulatory Flexibility Act (Pub. L. 96–354). No private entities will be affected by this action. The rule does not contain any information collection or record keeping requirements as defined in the Paperwork Reduction Act of 1980 (Pub. L. 96–511).

References Cited

Burkhead, N.M., and R.E. Jenkins. 1982. Five-year status review of the yellowfin madtom, *Noturus flavipinnis*, a threatened ictalurid catfish of the Tennessee drainage. Unpublished report to the U.S. Fish and Wildlife Service. 10 pp.

Jenkins, R.E. 1975. Status of the yellowfin madtom, *Noturus flavipinnis*. Unpublished report to U.S. Office of Endangered Species International Activities, Washington. 11 pp.

Shute, P.W. 1984. Ecology of the rare yellowfin madtom (*Noturus flavipinnis*) Taylor, in Citico Creek, Tennessee. Masters thesis. University of Tennessee, Knoxville, TN. 100 pp.

Author

The principal author of this final rule is Richard G. Biggins (see "ADDRESSES" section) (704/259–0321 or FTS 672–0321).

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Regulation Promulgation

Accordingly, Part 17, Subchapter B of Chapter I, Title 50 of the U.S. Code of Federal Regulations, is amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for Part 17 continues to read as follows:

Authority: Pub. L. 93–205, 87 Stat. 884; Pub. L. 94–359, 90 Stat. 911; Pub. L. 95–632, 92 Stat. 3751; Pub. L. 96–159, 93 Stat. 1225; Pub. L. 97–304, 96 Stat. 1411 (16 U.S.C. 1531 *et seq.*); Pub. L. 99–625, 100 Stat. 3500 (1986), unless otherwise noted.

2. Amend § 17.11(h) by revising the entry "Madtom, yellowfin" under FISHES to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Fishes:							
Madtom, yellowfin	*Noturus flavipinnis*	U.S.A. (TN, VA)	Entire, except where listed as an experimental population below.	T	28, 317	17.95(e)	17.44(c)
Do	do	do	North Fork Holston River and its tributaries, VA, TN; South Fork Holston River and tributaries upstream to Ft. Patrick Henry Dam, TN; and Holston River and tributaries downstream to John Sevier Detention Lake Dam, TN.	XN	317	NA	17.84(e)

§ 17.84 [Amended]

3. Amend Title 50 CFR 17.84 by adding new paragraph (e) as follows:

* * * * *

(e) Yellowfin madtom (*Noturus flavipinnis*).

(1) The yellowfin madtom population identified in paragraph (4) of this subsection is a nonessential experimental population.

(2) All prohibitions and exceptions listed in §§ 17.31 and 17.32 apply to the population identified in paragraph (e)(4) of this section, except that it may also be incidentally taken in accordance with applicable State laws and regulations.

(3) Any violation of State law regulating the take of this species from the population identified in paragraph (e)(4) of this section will also be a violation of the Endangered Species Act.

(4) This experimental population of the yellowfin madtom is found in the North Fork Holston River watershed, Washington, Smyth and Scott Counties, Virginia; South Fork Holston River watershed upstream to Ft. Patrick Henry Dam, Sullivan County, Tennessee; and the Holston River from the confluence of the North and South Forks downstream to the John Sevier Detention Lake Dam, Hawkins County, Tennessee. The reintroduction site is within the historic range of this species but it is totally isolated from existing populations of this species by large Tennessee River tributaries and reservoirs. As the species is not known to inhabit reservoirs, and it is unlikely that they could move 100 river miles through these large reservoirs, the possibility of this population contacting extant wild populations is unlikely.

Dated: June 24, 1988.

Susan Recce,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 88-17849 Filed 8-3-88; 8:45 am]

BILLING CODE 4310-55-M